No. 92-1074

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

HARRIS TRUST AND SAVINGS BANK,
as Trustee of the Sperry Master Retirement Trust
No. 2,
Respondent.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

**BRIEF OF *AMICUS CURIAE*
AMERICAN COUNCIL OF LIFE INSURANCE
SUPPORTING PETITIONER**

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38 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

FEDERAL STATUTES, REGULATIONS, LEGISLATIVE HISTORY

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

INTEREST OF *AMICUS CURIAE*[*]

The American Council of Life Insurance (the "Council") is a national trade association representing 634 life insurance companies which, in the aggregate, have approximately 93% of the assets of all United States life insurance companies and 98% of the insured pension business. By virtue of their sales of group annuity contracts and other pension products to employee benefit plans, these companies play a major role in the nation's retirement system. The Council estimates that, by year-end 1991, retirement benefits covering over 59.3 million participants and beneficiaries under private pension plans in the United States were funded through contracts issued by life insurance companies. *See* American Council of Life Insurance, *1992 Life Insurance Fact Book* 54-60 (1992).

Of a total $746 billion of reserves held by life insurance companies under annuity contracts with retirement plans as of year-end 1991, *id.* at 58, about $565 billion were held under "general account" contracts. These contracts provide for the assumption by an insurer of various risks associated with the provision of benefits to plan participants and beneficiaries. Money paid to an insurance company under general account contracts becomes part of the insurer's unsegregated general corporate assets, usually referred to as the insurer's general account assets.

The Council has a vital interest in this case. The Second Circuit has ruled that the issuance of a common form of general account contract to an employee benefit plan subjects an insurer's management of its general account assets to the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"). The Second Circuit's holding undermines the fundamental premises on which the insurance industry has sold billions of dollars of insurance contracts to retirement plans for over seven decades. ERISA's fiduciary responsibility provisions require a fiduciary to manage assets

[*] Petitioner and Respondent have consented to the filing of this brief. Copies of the parties' consent letters have been filed with the Clerk.

solely in the interest of and for the exclusive purpose of providing benefits to participants and beneficiaries of an ERISA-covered plan. Such requirements are fundamentally incompatible with the pooling of risks and collective management of assets which are necessary elements of a general account contract and the operation of an insurer's general account. Moreover, such requirements are fundamentally incompatible with state insurance regulatory standards which preclude the maintenance of any general account assets for the exclusive benefit of any particular contractholder and which mandate that insurers deal fairly and equitably with all contractholders as a group. Thus, as the State of New York has informed this Court, the Second Circuit's ruling, if allowed to stand, "would wreak havoc on the regulation of the insurance industry." Brief of *Amicus Curiae* The Attorney General of the State of New York in Support of the Petition for a Writ of Certiorari 4 ("New York Brief").

SUMMARY OF THE ARGUMENT

General account assets are not, and under state insurance laws cannot be, segregated and managed exclusively for the benefit of particular contractholders. Consequently, trust law has long recognized that an insurer does not become a fiduciary to the purchaser of a general account contract. ERISA's text and legislative history evidence no congressional intent to depart from this traditional characterization of such contracts, nor an intent to impose a scheme of federal regulation which is incompatible with the traditional operation and regulation of such contracts.

With its codification of trust law principles, ERISA imposes fiduciary responsibilities on those persons who manage "plan assets." 29 U.S.C. § 1002(21)(A)(i). Although the statute does not define the term "plan assets," ERISA section 401(b)(2) specifically excludes from "plan asset" status the consideration received under a "guaranteed benefit policy," defined as a contract or policy of insurance "to the extent that [it] provides for benefits the amount of which is guaranteed by the insurer." 29 U.S.C.

§ 1101(b)(2). This exclusion, understood in the context of the traditional operation and treatment of general accounts, is properly construed to include all traditional forms of general account contracts, including the one at issue in this case. These contracts provide that the entirety of contract funds can be applied to fund an insurer's payment of fixed, guaranteed benefit payments to employee benefit plan participants and beneficiaries. Confirming this view of the statute, the Department of Labor ("DOL") has unequivocally stated that the consideration placed by an insurer in its general account "shall not be considered to be plan assets." 29 C.F.R. § 2509.75-2.

In *Mack Boring & Parts v. Meeker Sharkey Moffitt*, 930 F.2d 267 (3d Cir. 1991), the Third Circuit properly interpreted the language of section 401(b)(2) in accordance with its intended meaning and DOL's authoritative guidance. The Third Circuit's interpretation, moreover, is compatible with the commercial and regulatory environment that formed the background to ERISA's enactment.

The Second Circuit, in contrast, misconstrues or ignores important phrases of the statutory text and DOL's construction. *Harris Trust & Savings Bank v. John Hancock Mutual Life Insurance Co.*, 970 F.2d 1138 (2d Cir. 1992), *aff'g in part and rev'g in part*, 722 F. Supp. 998 (S.D.N.Y. 1989) *and* 767 F. Supp. 1269 (S.D.N.Y. 1991). The court's conclusion, that so-called "free funds" under the Hancock contract are "plan assets" for ERISA fiduciary purposes, is also inadministrable. No particular general account assets can legally or practically be attributed to such funds or any portion of a traditional general account contract. Finally, the Second Circuit's interpretation fails to consider the significant conflicts that would result were insurer general account assets subject to both ERISA's fiduciary responsibility provisions and state insurance laws. It is clear from ERISA's "insurance saving clause," 29 U.S.C. § 1144(b)(2), and the McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.*, that Congress sought to avoid such conflicts by reserving the regulation of the business of insurance

for the states. For these reasons, this Court should reverse the judgment of the Second Circuit that "free funds" under Hancock's contract constitute "plan assets."

BACKGROUND

With the enactment of ERISA, Congress "codif[ied] and [made] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts." *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 110 (1989) (citations omitted). To understand why ERISA section 401(b)(2) cannot fairly be construed to make trust law principles applicable to general accounts, it is necessary to examine the critical distinctions between trust arrangements and general accounts which existed prior to ERISA's enactment and continue in effect today.

1. General Account Contracts Are Fundamentally Different from Trust Arrangements

Trust arrangements and general account insurance contracts traditionally have constituted the two primary vehicles through which retirement plans have accumulated funds to pay benefits to their participants and beneficiaries. Because those two vehicles are very different, they historically have been governed by fundamentally different schemes of regulation.

A plan placing funds in a trust account of a bank or other financial institution receives no guarantees from the trustee as to the investment performance of the trust's assets or their sufficiency to satisfy the plan's obligations to pay benefits.[1] Rather, the trustee simply obligates itself to invest the trust assets in a manner consistent with the plan's objectives and to return to the plan the trust assets as increased or diminished by investment results. Because

[1] James A. Hamilton, *Trust Fund Pension Plans, in* Life and Health Insurance Handbook 545 (Davis W. Gregg ed., 2d ed. 1964) ("[b]y its very nature, the trust fund cannot make guarantees of any sort"). Trust arrangements are described in Hamilton, *supra*, at 538-52; Dan M. McGill, Fundamentals of Private Pensions 285-89 (3d ed. 1975).

the plan retains all essential equitable attributes of ownership of the trust's assets, the common law characterizes the relationship between a plan and trustee as a fiduciary relationship. McGill (1975), *supra* note 1, at 286. This relationship requires the trustee to segregate the trust's assets from its own assets, and to manage them for the exclusive benefit of the plan. *Id.*; Restatement (Second) of Trusts §§ 2, 170 & 179 (1959). ERISA applies the same basic requirements to trust arrangements. *See* 29 U.S.C. §§ 1103(a), 1104(a)(1).

Insurance company general account contracts are a very different vehicle. They include various guarantees under which the insurer assumes risks related to the funding and distribution of plan benefits.[2] As under various other forms of individual and group insurance contracts involving the assumption of risks (*e.g.*, life insurance contracts and health insurance contracts), the consideration received from an employee benefit plan becomes part of the insurer's gen-

[2] An insurer's business of risk-assumption for pension contracts has been described as follows:

> The life insurance company is in the business of accepting risks and is willing to underwrite several different risks associated with pension plans and to underwrite them to varying degrees, depending on the employer's wishes. Some of these risks are as follows:
>
> 1. More people may live to retire than the assumed mortality tables anticipated.
> 2. Those who retire may live longer than the mortality tables anticipated.
> 3. The rate of interest earned on investments may fall below the anticipated level.
> 4. There may be defaults in the investment portfolio or it may be necessary to sell particular investments at a loss.
> 5. Expenses of handling the plan may be higher than anticipated.

S.S. Huebner & Kenneth Black, Jr., Life Insurance 569 (7th ed. 1969) (footnote omitted); *accord* Kenneth Black, Jr. & Harold D. Skipper, Jr., Life Insurance 494 (11th ed. 1987), *quoted in Harris Trust,* 722 F. Supp. at 1016 n.26.

eral account. No general account assets are segregated for the benefit of any particular contractholder or are specifically reserved for any particular contract. Rather, all general account assets are available to satisfy all of an insurer's obligations under each of its contracts.[3]

The maintenance of such an unsegregated account and its management for the collective benefit of all contractholders is essential to the pooling and equitable spreading of risks which lies at the heart of the business of insurance.[4] Plans that choose to purchase general account con-

[3] Dan M. McGill & Donald S. Grubbs, Jr., Fundamentals of Private Pensions 492 (6th ed. 1989) ("Under a life insurer's traditional mode of operation, all of its assets are held in one commingled account and are available for the satisfaction of any and all obligations of the company, regardless of their nature or source. The account is not labeled, since it is constituted of all the insurer's assets which are not earmarked for any particular obligations or segmented in any way."). Assets in an insurer's general account include its buildings, equipment and other operating assets as well as its stocks, bonds, real estate and other investment assets. From its general account, the insurer pays all of its operating expenses (*e.g.*, salaries, rent, taxes, etc.); all of its obligations to general creditors; all of its obligations to its life, health, annuity and other policyholders (other than policyholders participating in separate accounts); and dividends to participating policyholders and shareholders. For most companies, the greatest number of general account policyholders are individuals and entities other than employee benefit plans. *See Mack Boring*, 930 F.2d at 268 & n.2.

[4] In managing its business, an insurer must perform several major functions on an ongoing basis. These functions include the selection and control of its risks (underwriting), the investment and management of its assets, and the determination and allocation of its investment income and surplus. Because all general account assets stand behind all general account liabilities on an unsegregated basis, none of these functions is or can be carried out without careful consideration of the corporate-wide objectives of the insurer and the interests of all of its policyholders and other constituents. Principally, the objectives include (1) the need to maintain sufficient assets, surplus, and cash flow to meet all of the insurer's different obligations to its present and future contractholders and other constituents; and (2) the need to maintain equity among such contractholders and constituents in the consideration which the insurer charges and the manner in which investment income and surplus are allocated and distributed. *See* Robert E. Keeton & Alan

tracts do so with the full understanding that their payments to the insurer will become part of the insurer's general corporate assets and will not be managed solely in their interest or applied exclusively for their benefit. Indeed, they generally draw comfort from the fact that the contractual rights which they have acquired in exchange for such consideration will be supported on an unsegregated basis by a large pool of assets derived from various classes of business.

Recognizing the fundamental differences between the placement of funds in trust and the purchase of a general account insurance contract,[5] the common law characterizes the relationship between an insurer and a contractholder as contractual, rather than as a fiduciary relationship. *See* Restatement (Second) of Trusts § 12 comment k (when "payments are to be made out of the general assets of the insurance company, it holds nothing in trust and is not a trustee but is a debtor").[6] Because of the inapplic-

I. Widiss, Insurance Law: A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices § 8.2, at 938-39 (1988).

[5] A trust is defined as "a fiduciary relationship *with respect to property*, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person." Restatement (Second) of Trusts § 2 (emphasis added). The relationship of parties to a contract is that of promisor and promisee, obligor and obligee, or debtor and creditor. 76 Am.Jur.2d *Trusts* §§ 15, 46-47 (1992). General account contractual relationships lack the element of an identifiable and divisible property, which is at the heart of a trust arrangement. *Id.; In re Black & Geddes, Inc.*, 35 B.R. 830, 836 (S.D.N.Y. 1984) (citing state and federal cases for the proposition: "It is a firmly established principle that if a recipient of funds is not prohibited from using them as his own and commingling them with his own monies, a debtor-creditor, not a trust, relationship exists.").

[6] *See, e.g., Equitable Life Assur. Soc'y v. Brown*, 213 U.S. 25, 46 (1909) (under New York law, "'it cannot be said that the [insurer] is, in any sense, a trustee of any particular fund for the [contractholder], or that it acts as to him and in relation to any such fund in a fiduciary capacity' "; quoting and following *Uhlman v. New York Life Ins. Co.*, 109 N.Y. 421 (1888)); *Rochester Radiology Assoc. v. Aetna Life Ins. Co.*, 616 F. Supp. 985, 988 (W.D.N.Y. 1985); *Gross v. Penn Mut. Life Ins. Co.*, 356 F. Supp. 664, 666 (E.D. Pa. 1973) (following collected

ability of trust law requirements, insurers have been able to issue insurance contracts whose obligations are supported by commingled assets, the management of which is not and cannot be undertaken solely on behalf of any particular contractholder.

The interests of employee benefit plans and other general account contractholders are protected by state insurance laws. These laws are designed to assure that all contractholders are treated equitably and on a non-discriminatory basis, and that an insurer is able to satisfy its contractual obligations to all its contractholders. New York Brief, *supra* p. 2, at 5-7. In addition, employee benefit plan contractholders may seek judicial relief to redress an insurer's breach or violation of its contractual commitments. Plan contractholders and their participants and beneficiaries are protected, as well, by the fiduciary requirements placed on the plan sponsor (*i.e.*, employer or union), trustee, or other plan representative who is responsible for the prudent selection, monitoring, and disposition of these contracts.[7]

2. All Traditional General Account Contracts, Including the Unallocated General Account Contracts at Issue in this Case and in *Mack Boring*, Provide in Their Entirety for Guaranteed Benefits

ERISA section 401(b)(2) expressly excludes from the statute's fiduciary responsibility provisions the manage-

cases); *Mutual Ben. Life Ins. Co. v. Ellis*, 125 F.2d 127, 130 (2d Cir.) ("Surely the proceeds of the policies left with the company were not intended to be earmarked and could not be regarded as property equitably belonging to [the policyholder] which would be unavailable to satisfy claims of the company's creditors. Restatement, Trusts, § 12 and § 14, Illustration 3; 1 Scott on Trusts, pp. 87, 93, 94."), *cert. denied sub nom. Eisenlord v. Ellis*, 316 U.S. 665 (1942).

[7] *Harris Trust*, 970 F.2d at 1145; *District 65, U.A.W. v. Harper & Row Publishers, Inc.*, 696 F. Supp. 29, 33 (S.D.N.Y. 1988); Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 93-1280, 93d Cong., 2d Sess. (1974) [hereinafter ERISA Conference Report], *reprinted in* 1974 U.S.C.C.A.N. 5038, 5079.

ment of consideration received under an insurance policy or contract which "provides for benefits the amount of which is guaranteed by the insurer." 29 U.S.C. § 1101(b)(2). The meaning of this exclusion is best understood with reference to the types of insurance contracts that have been commonly used as vehicles for the funding and distribution of retirement benefits, both before and after ERISA's enactment.

The ultimate purpose of insurance company contracts issued to retirement plans has been to enable plans to provide annuities and other benefits to plan participants and beneficiaries. In the case of general account contracts, the annuity benefits are guaranteed (fixed) in amount and do not vary with the investment performance of the underlying general account assets.[8]

At issue in both this case and *Mack Boring* are "unallocated" general account contracts. These are the most popular form of insurance contracts sold to retirement plans both before and after ERISA's enactment.[9] Under "unallocated" contracts, deposits and other contributions are credited to an unallocated account, and are generally not applied to the payment or purchase of guaranteed

[8] McGill & Grubbs (1989), *supra* note 3, at 526 ("[T]he general principle and tradition [is] that *all contractual guarantees of a life insurer are obligations of the general asset account*. The *guarantees are fixed-dollar obligations*, payable without adjustment for fluctuations in the market value of the underlying assets." (emphasis added)).

[9] The traditional forms of unallocated contracts are the deposit administration contract (DA), which was at issue in *Mack Boring*, and the immediate participation guarantee contract (IPG), which is a modified form of DA and is at issue in this case. DA and IPG contracts are described in Morgan H. Alvord, *Deposit Administration and Separate Accounts*, *in* Life and Insurance Handbook 525, 530-33 (Davis W. Gregg ed., 2d ed. 1964); Huebner & Black (1969), *supra* note 2, at 572-74; Douglas B. Hunter, *Funding Instruments—Deposit Administration Contracts and Separate Accounts*, *in* Life and Health Insurance Handbook 614, 619-22 (Davis W. Gregg & Vane B. Lucas eds., 3d ed. 1973); McGill (1975), *supra* note 1, at 261-80; McGill & Grubbs (1989), *supra* note 3, at 550-64.

benefits until a participant retires.[10] The unallocated account of these contracts is a bookkeeping device that keeps track of the dollar value of the amounts contributed by the contractholder and allocated in the insurer's general account, less amounts that are applied to the purchase or payment of benefits.[11] The insurer guarantees the preservation of the principal balance of the bookkeeping account.[12] It also guarantees the rates at which the funds reflected in the bookkeeping account can be applied to the purchase of guaranteed benefits for participants. *See* authorities cited *supra* note 12.

Most unallocated contracts, including those at issue in this case and in *Mack Boring,* credit interest to the unallocated account based in whole or in part on the insurer's investment results.[13] While credited interest (*i.e.*, investment return to the plan sponsor as contractholder) may vary with the insurer's investment results, the insurer guarantees that its payment of fixed benefits to plan par-

[10] McGill (1975), *supra* note 1, at 261-63 & 278; *see* Alvord (1964), *supra* note 9, at 530 & 532-33; Huebner & Black (1969), *supra* note 2, at 572-73. In contrast, under most forms of "allocated" contracts in use when ERISA was enacted, premiums are applied immediately to purchase deferred guaranteed annuities and other fixed benefits for participants, even though benefits are not yet payable under the plan. *See* McGill (1975), *supra* note 1, at 225-26.

[11] *Mack Boring,* 930 F.2d at 268. The unallocated account may be referred to by names such as "accumulation fund," "deposit administration fund," and "IPG account." Alvord (1964), *supra* note 9, at 530 & n.2 & 533; McGill (1975), *supra* note 1, at 262 & 278.

[12] Alvord (1964), *supra* note 9, at 530-31; Huebner & Black (1969), *supra* note 2, at 572-74; Hunter (1973), *supra* note 9, at 619-20.

[13] Alvord (1964), *supra* note 9, at 531 & 533; Huebner & Black (1969), *supra* note 2, at 572-73; Hunter (1973), *supra* note 9, at 619 & 621. Virtually all "allocated" contracts (*supra* note 10) also provide for the plan sponsor's participation in the insurer's investment results, through experience (rate) credits or dividends, to the extent that the insurers' actual investment and mortality experience is better than the investment and mortality assumptions upon which the price of the annuities purchased under the contract were based. McGill (1975), *supra* note 1, at 258-59; McGill & Grubbs (1989), *supra* note 3, at 547-48.

ticipants which are funded from the account will not vary in amount based on such investment results, *see supra* note 8, and that all funds allocated to the account may be used to provide such benefits.[14] Accordingly, like any other traditional form of general account contract, unallocated contracts in their entirety "provide[ ] for benefits the amount of which is guaranteed." As will be demonstrated herein, the Second Circuit's interpretation of ERISA section 401(b)(2) confuses the nature of the *benefits* provided to plan participants and beneficiaries under a general account contract (which are invariably guaranteed) with the nature of the *investment returns* to the plan sponsor (which are rarely fully guaranteed).

3. Separate Account Facilities Are Similar to Trust Arrangements and Do Not Offer the Guarantees of a General Account

Under section 401(b)(2), a contract is a guaranteed benefit policy only "to the extent that" it provides for guaranteed benefits. This statutory language was intended to distinguish between guaranteed benefits supported by a general account and variable benefits supported by an insurance company "separate account."[15]

Because of the nature of general accounts and their regulation under state insurance laws, insurers traditionally were limited to offering only general account contracts providing for the payment of fixed benefits to plan par-

[14] Huebner & Black (1969), *supra* note 2, at 573 (under IPG, like DA, contracts "the life insurance company guarantees that the annuities for retired employees will be paid in full"; under IPG contracts, "If the employer allows the fund to fall below the critical level and the contract enters the second stage, the amount in the fund is used to establish fully guaranteed annuities and the fund itself ceases to exist."); *accord* Alvord (1964), *supra* note 9, at 531 & 533; McGill (1975), *supra* note 1, at 263 & 278; McGill & Grubbs (1989), *supra* note 3, at 552 & 563-64.

[15] *See infra* pp. 19-20. Separate accounts are described in Alvord (1964), *supra* note 9, at 534-36; Huebner & Black (1969), *supra* note 2, at 574; Hunter (1973), *supra* note 9, at 623-24; McGill (1975), *supra* note 1, at 280-83; McGill & Grubbs (1989), *supra* note 3, at 494-97.

ticipants.[16] During the early 1960's, most states amended their insurance laws to authorize the establishment of separate accounts for use to pay annuity benefits which vary in amount with the investment performance of the assets allocated to the separate account ("variable annuities").[17]

Besides their use to pay variable benefits,[18] separate accounts are fundamentally different from general ac-

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[16] *See supra* note 3. Significantly, in 1957, the Connecticut Supreme Court held that variable annuity benefits could not be paid with respect to a general account contract. *See Spellacy v. American Life Ins. Ass'n*, 131 A.2d 834 (Conn. 1957). By the time of ERISA's enactment, most states had adopted legislation or regulations authorizing the use of separate accounts in connection with variable annuities. *See* McGill (1975), *supra* note 1, at 203 ("A life insurance company places the assets of a variable annuity pension plan (or the variable component of an overall pension plan) in a separate account, distinct from the general asset account of the company."); *accord* Huebner & Black (1969), *supra* note 2, at 574; Hunter, *supra* note 9, at 624; DOL Advisory Op. 78-8A (Mar. 13, 1978) (stating DOL's "understanding that the various state laws which regulate insurance companies prohibit an insurance company from placing premiums paid for variable annuity contracts in a general asset accounts"); *see also* statute cited *infra* note 23.

[17] *See supra* note 16. Another purpose of separate accounts was to enable insurers to better compete with bank trusts by offering retirement plans the types of segregated and customized investment management services which were unavailable through a general account. *See* McGill (1975), *supra* note 1, at 280-81.

[18] A typical unallocated group annuity contract may offer both general and separate account facilities. Some of these contracts provide only for the payment of fixed benefit annuities guaranteed in amount by the general account. Alvord (1964), *supra* note 9, at 535 ("At the time of [a participant's] retirement, sufficient amounts are withdrawn from the [unallocated general account] fund or the separate account to provide the annuity payments to which the employees are entitled under the pension plan. These annuities are fixed in amount and do not vary with investment experience, as is the case with variable annuities.") Other forms of these contracts permit the plan sponsor to use separate account funds to purchase both fixed annuities and variable annuities. McGill (1975), *supra* note 1, at 282 ("The separate account funds under a deposit administration contract may be used for the purchase of immediate [fixed] annuities in accordance with a stipulated schedule of annuity rates. The sums paid for fixed-income immediate annuities are transferred to the general asset account, but sums set aside for asset-

counts, and substantially the same as trusts, in two other principal respects. First, retirement plan funds allocated to a separate account are legally segregated from an insurer's general corporate assets and (like trust assets but unlike general account assets) are managed exclusively for the benefit of the plan or plans which contribute to the account. *See* authorities cited *supra* note 15. Second, under all forms of separate account contracts in use when ERISA was enacted, the insurer provided no guarantees regarding the principal balance of the funds accumulating in the separate account; such funds always fluctuated dollar for dollar with the investment performance of the underlying separate account assets.[19]

ERISA's legislative history reflects Congress's intent to subject the management of separate account assets to the statute's fiduciary responsibility provisions, because of the similarity of separate accounts to trusts. *See* ERISA Conference Report, *supra* note 7, at 297 ("[I]t is understood that assets placed in a separate account managed by an insurance company are *separately managed* and the *insurance company's payments generally are based on the investment performance of these particular assets*. Consequently, insurance companies are to be responsible under the general fiduciary rules with respect to assets held under separate account contracts, and the assets of these contracts are to be considered as plan assets. . . ." (em-

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based (variable) annuities are held in a separate account maintained for the underwriting of such annuities.").

[19] McGill (1975), *supra* note 1, at 281-82 ("[The insurer] promises neither preservation of principal nor a minimum rate of return. The account is maintained on a market value basis and the actual investment experience, including realized and unrealized capital gains and losses, is reflected directly and immediately in the status of the account."); *accord* Huebner & Black (1969), *supra* note 2, at 574. Subsequent to ERISA's enactment, insurers began offering investment guarantees with respect to certain separate accounts that were used to fund guaranteed interest contracts. *See id.* at 500; Proposed Class Exemption for Guaranteed Investment Contract Separate Accounts, 45 Fed. Reg. 51303, 51304 (Aug. 1, 1980).

phasis added)), *reprinted in* 1974 U.S.C.C.A.N. at 5077.[20] No similar intent was expressed with regard to any type of general account contract or portion of general account assets.

ARGUMENT

A. THE LANGUAGE OF ERISA MANIFESTS NO INTENT TO ALTER THE TRADITIONAL REGULATION AND OPERATION OF INSURERS' GENERAL ACCOUNTS

ERISA's text suggests no intention to depart from the traditional characterization of general accounts or to impose upon them a scheme of regulation which was incompatible with their customary operation and regulation under state insurance laws.

As under common law, ERISA's fiduciary provisions do not apply to all parties who enter into contracts with an employee benefit plan. They apply only to a "fiduciary," which is defined to include any person who "exercises any authority or control respecting the management or disposition of [*a plan's*] *assets*." 29 U.S.C. § 1002(21)(A)(i) (emphasis added). Although the term "assets of the plan" ("plan assets") is used in many ERISA provisions, it is not comprehensively defined. But the plain and ordinary meaning of the term "assets of the plan" cannot reasonably be construed to apply to an insurer's own unsegregated general corporate assets merely because some of those assets are derived from contributions made under an insurance contract issued to an employee benefit plan.

The exclusion of general account assets from the fiduciary rules is confirmed in the only ERISA provision expressly addressing plan asset status. ERISA section 401(b) provides that the underlying assets of a mutual fund (registered investment company) or insurance company do not become plan assets by virtue of an employee benefit plan's purchase of a mutual fund security or a "guaranteed benefit policy," as the case may be. 29 U.S.C. § 1101(b). The common feature of these two exclusions from plan asset status (and the fiduciary rules) is that both mutual funds and insurance companies are subject to other existing well-developed regulatory schemes.[21]

[20] This treatment also is reflected in ERISA's reporting provisions, which require that certain financial information be provided as to the "assets of a plan" held by banks under various trust arrangements and the "assets of a plan" held by insurance companies in their separate accounts. 29 U.S.C. § 1023(a)(2)(A)-(B), (b)(3)(G). There is no similar statutory reference to assets held in a general account.

The guaranteed benefit policy provision of section 401(b)(2) provides, in its entirety:

> (2) In the case of a plan to which a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy, but shall not, solely by reason of the issuance of such policy, be deemed to include any assets of such insurer.
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> . . . .
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> (B) The term "guaranteed benefit policy" means an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer. Such term includes any surplus in a separate account, but excludes any other portion of a separate account.

29 U.S.C. § 1101(b)(2).

[21] *See* ERISA Conference Report, *supra* note 7, at 296 ("Since mutual funds are regulated by the Investment Company Act of 1940 and, since (under the Internal Revenue Code) mutual funds must be broadly held, it is not considered necessary to apply the fiduciary rules to mutual funds merely because plans invest in their shares."), *reprinted in* 1974 U.S.C.C.A.N. at 5077; Proposed Regulations Relating to Definition of Plan Assets, 44 Fed. Reg. 50363, 50364 (Aug. 28, 1979) (§ 401(b)(2)'s "exemption for contracts or policies issued by insurers and *funded by insurer's general accounts* also appears to be based upon the fact that the plan benefits provided under such contracts or policies are insured by an *entity which is subject to state regulation designed to assure the entity's ability to pay benefits specified in the policy when due*." (emphasis added)).

An insurance policy comes within section 401(b)(2)(B): 1) "to the extent that," 2) it "provides for," 3) "benefits" the "amount of which is guaranteed," 4) including "surplus in a separate account" but excluding "any other portion of a separate account." As demonstrated below, these elements, taken together and applied with a view to longstanding commercial arrangements of which Congress must have been aware when it enacted ERISA, support the conclusion that a traditional unallocated general account contract is a "guaranteed benefit policy" in its entirety.

B. THE "GUARANTEED BENEFIT POLICY" EXCLUSION FROM PLAN ASSET STATUS ENCOMPASSES ALL TRADITIONAL GENERAL ACCOUNT CONTRACTS IN THEIR ENTIRETY

In *Mack Boring*, the Third Circuit held that the entirety of an unallocated general account contract was a guaranteed benefit policy, because the entire amount represented by the unallocated account could be applied immediately or in the future to purchase fixed guaranteed benefits for plan participants and beneficiaries. *Mack Boring*, 930 F.2d at 273-75. The Second Circuit, on the other hand, concluded that if any portion of the funds held under a general account contract are not immediately applied to support the costs of paying guaranteed benefits to participants, and no guarantees of investment returns on such funds are furnished to the plan sponsor (the contractholder), then "to [that] extent" the contract is not a guaranteed benefit policy and, consequently, such funds are plan assets. *Harris Trust*, 970 F.2d at 1144. Such a reading of the guaranteed benefit policy provision mistakenly assumes that the term "benefits" refers to amounts credited under the contracts to the plan sponsor. Such a reading also ignores the phrase "provides for" and fails to attach any significance to the "separate account" language of section 401(b)(2)(B).

1. "Benefits" the "Amount of Which Is Guaranteed"

The basic scope of the guaranteed benefit policy provision is expressed in terms of the "benefits" provided by

the policy. Thus, the essential starting point for the statute's interpretation is a proper understanding of what "benefits" are for purposes of ERISA. Here again, the statute provides no express definition. But numerous provisions in the statute and the customary meaning of the term leave no doubt that it refers to payments to plan participants or their beneficiaries.

"Benefits" is used throughout ERISA itself and customarily in the life insurance industry to mean a payment to a plan participant or beneficiary.[22] Indeed, a primary requirement of ERISA's fiduciary rules is that plan assets must be used "for the exclusive purpose of . . . *providing benefits* to participants and their beneficiaries." *See* 29 U.S.C. § 1104(a)(1)(A)(i) (emphasis added). Thus, this is a "classic case for application of the 'normal rule of statutory construction that " 'identical words used in different parts of the same act are intended to have the same meaning.' " ' " *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (citations omitted).

A traditional general account contract provides only for "benefits the amount of which is guaranteed." *See supra* notes 8 & 14 and accompanying text. Unlike the variable investment returns that may be credited to plan sponsors, the contractual benefits paid to plan participants (including all benefits under the Hancock contract) do not vary with the insurer's investment experience. *Id.* The Second Circuit concluded that the Hancock contract provided for benefits that were not guaranteed in amount, because the interest credited to the contractholder plan sponsor on the free funds portion of the contract was "dependent upon the insurer's investment experience and therefore *variable*

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[22] A few of the many ERISA examples are listed in *Mack Boring*, 930 F.2d at 273, and by the district court in this case, *Harris Trust*, 722 F. Supp. at 1017-18. For illustrations in the insurance industry, see, e.g., N.Y. Ins. Law § 161(1)(d) (1966) ("The benefits payable under any such policy shall be payable to the beneficiary or beneficiaries designated by the insured"); Walter J. Couper & Roger Vaughan, Pension Planning: Experience and Trends 190 (1954) (glossary: "*Benefit:* The amount payable to a participant or his beneficiaries under a plan.").

with respect to the benefits it provides." *Harris Trust*, 970 F.2d at 1143 (emphasis added). This conclusion should be rejected, because it fails to construe the term "benefits" in accordance with its usage elsewhere in the statute. *See Mack Boring*, 930 F.2d at 273 ("Payments made to plan sponsors can be variable without taking a DA contract out of the safe harbor created for guaranteed benefit policies.").

As the sole support for its conclusion, the Second Circuit cited language in the ERISA Conference Report, *supra* note 7, which states: "If the policy guarantees basic *payments* but other *payments* vary with, *e.g.*, investment performance, then the variable part of the policy and assets attributable thereto are not to be considered as guaranteed, and are to be considered as plan assets subject to the fiduciary rules." *Id.* at 296 (emphasis added), *reprinted in* 1974 U.S.C.C.A.N. at 5077. The Second Circuit's reading of this language attributes far too much significance to the use of the word "payments" instead of "benefits." In context, it is clear that nothing more than a synonym for benefits was intended.[23] In any event, the Conference Report cannot reasonably be used to give the statutory word "benefits" a meaning different from its uniform usage elsewhere in ERISA. *Mack Boring*, 930 F.2d at 275 ("there is no indication that the word 'payments' in the Conference Report has a meaning different from the meaning we give to the word 'benefits' in the statute"); *Harris Trust*, 722 F. Supp. at 1017-18 ("The word 'benefit' in the guaranteed benefit policy exception, and the word 'payment' in the conference report, are no different; they too refer to benefits and payments to covered employees.").

[23] The Conference Report's reference to payments that "vary" with "investment performance" is consistent with language in state insurance codes, when ERISA was enacted, defining variable annuity contracts supported by separate accounts. *See, e.g.*, Mass. Gen. L. ch. 175, § 132G (1970) ("Contract on a variable basis" means "any contract . . . providing for the amount of benefits or other contractual payments or values thereunder to *vary*, in whole or in part, so as to reflect the *investment results* of a *separate investment account or accounts* established under this section in which amounts received in connection with any such contract have been placed" (emphasis added)).

2. "Provides for"

The phrase "provides for" is significant in the context of the unallocated contracts which have been commonplace since long before ERISA's enactment. As discussed above, amounts invested in an unallocated general account contract are credited to a bookkeeping account which the plan sponsor can use to purchase fixed annuities when plan participants become eligible for benefits. *See supra* pp. 9-11. The phrase "provides for" tersely captures the essence of this arrangement.

As commonly understood, the term "provides for" is not limited to immediate action, but also includes measures in preparation. *Mack Boring*, 930 F.2d at 273 ("The dictionary definition of 'provide' is to 'make, procure, or furnish for future use, prepare. To supply; to afford; to contribute.' Black's Law Dictionary (5th ed. 1979)."). In this case, it is uncontested that all funds credited to the Hancock contract, including "free funds," can be used to provide for future guaranteed benefits to participants. Thus, the entire unallocated contract "provides for" guaranteed benefits.

The Second Circuit concluded that free funds are not covered by the guaranteed benefit policy provision because they do not support the *immediate* payment to participants of guaranteed benefits. This construction ignores the plain meaning of the term "provides for." As the Third Circuit explained: "A DA contract clearly 'makes, procures or furnishes for the future use' of the plan participants a fixed amount of benefits. Section 401(b)(2)(B) does not, on its face, require that the benefits contracted for be delivered immediately, and we will not read into the statute such a requirement." *Mack Boring*, 930 F.2d at 273.

3. "To the Extent That"

The foregoing analysis of the phrases "benefits" and "provides for" furnishes the proper context for construing

the phrase "to the extent that." A typical unallocated contract may combine both general and separate account features, providing both for guaranteed benefits to participants paid through the general account and variable annuity benefits paid to participants through a separate account. *See supra* note 18. Such a contract is a guaranteed benefit policy only "to the extent that" it provides for guaranteed benefits (*i.e.*, only to the extent of the general account portion of the contract). *Mack Boring*, 930 F.2d at 274.

The "to the extent that" language is not determinative of the application of section 401(b)(2) to the contracts in *Mack Boring* and in this case. Neither contract provides for variable benefits. Both contracts provide only for benefits that are guaranteed in amount, irrespective of the investment performance of the free funds (or any other general account funds). The Second Circuit erred in its conclusion that general account contracts may not be guaranteed benefit policies to the extent that they provide for variable investment returns for plan sponsors. As demonstrated above, such returns are not "benefits."

4. Including "Surplus in a Separate Account" But Excluding "Any Other Portion of a Separate Account"

The conclusion that a general account contract does not fall outside of the definition of a guaranteed benefit policy "to the extent that" it provides for variable investment returns to the plan sponsor is reinforced by section 401(b)(2)(B)'s second sentence, which expressly excludes separate account assets (other than separate account surplus) from the definition of guaranteed benefit policy. Under contracts commonly in use at the time of ERISA's enactment, the entire amount of separate account funds available to the plan sponsor always fluctuated dollar for dollar with the investment performance of the underlying separate account assets. *See supra* note 19 & accompanying text. Thus, if Congress had intended for the first sentence of section 401(b)(2)(B) to exclude from the definition of a guaranteed benefit policy those portions of a

contract which provide for variable investment returns to the plan sponsor, as the Second Circuit so construed, all separate account assets would have been excluded from the definition of guaranteed benefit policy even in the absence of section 401(b)(2)(B)'s second sentence. The Second Circuit's construction thus contradicts a fundamental principle of statutory construction that "an interpretation of a statute [is to be avoided if it] renders any part of it superfluous and does not give effect to *all of the words* used by Congress." *Beisler v. Commissioner*, 814 F.2d 1304, 1307 (9th Cir. 1987) (emphasis added); *see Gade v. National Solid Wastes Management Ass'n*, 112 S. Ct. 2374, 2384 (1992) (it is the Court's "duty to " 'give effect, if possible, to every clause and word of a statute" ' ") (citations ommitted).

But the second sentence was not superfluous. Many forms of contracts issued to employee benefit plans permit contributions to both the general account and separate accounts, but provide only for the payment of fixed benefit annuities guaranteed in amount through the general account. *See supra* note 18. Were it not for the presence of section 401(b)(2)(B)'s second sentence excluding separate account assets (other than surplus)[24] from the definition of guaranteed benefit policy, a contract of this nature would

[24] The exclusion of all general account assets from treatment as plan assets is reinforced by the express inclusion of separate account "surplus" in the definition of guaranteed benefit policy. Separate account surplus is general account funds invested by the insurer to start-up a separate account and to provide for contingencies. *See e.g.*, 1969 Ga.L. 538, § 56-1040(j) (1969) ("[insurer] may allocate from its general accounts to each separate account . . . initial cash amount necessary to meet minimum capitalization requirements for such account"); *accord* N.C. Gen. Stat. § 58-7-95(c) (1969); *see also* ERISA Conference Report, *supra* note 7, at 297 ("to the extent that insurance companies place *some of their own funds* in these separate accounts to provide for contingencies, *this separate account "surplus"* is not to be subject to the fiduciary responsibility rules" (emphasis added)), *reprinted in* 1974 U.S.C.C.A.N. at 5077. In view of the outright exclusion of general account assets of an insurer invested in a separate account, it would be anomalous to apply ERISA's fiduciary responsibility rules to any other general account assets.

be treated as a guaranteed benefit policy in its entirety. In view of Congress's intent to impose fiduciary obligations with respect to separate account assets because of their similarities to trust arrangements, *see supra* pp. 13-14 & note 20, the second sentence "was necessary to close what would have [otherwise] been a very large loophole in the plan asset provisions of ERISA." *Mack Boring*, 930 F.2d at 274.

C. THE SECOND CIRCUIT'S INTERPRETATION IS INCAPABLE OF PRACTICAL APPLICATION, AND WOULD SUBJECT INSURERS TO CONFLICTING STATE AND FEDERAL REGULATION IN CONTRAVENTION OF CONGRESS'S EXPRESS INTENT

As demonstrated above, the non-application of ERISA's fiduciary responsibility provisions to an insurer's management of its general account assets is consistent with the statutory text. Moreover, it is consistent with Congress's clearly expressed intention not to disrupt state regulation of the business of insurance and with the absence of any evidence in the legislative history of ERISA of an intent to impose upon the management of insurance company general accounts a scheme of regulation which is fundamentally incompatible with their operation. On the other hand, the Second Circuit's interpretation of the text is incapable of practical application and subjects insurers to sharply conflicting state and federal schemes of regulation which would preclude the sale to retirement plans of traditional general account contracts which have been utilized by such plans for over seven decades.

The Second Circuit's interpretation of ERISA's guaranteed benefit policy provision assumes that Congress intended to subject certain "portions" of a general account contract to ERISA's fiduciary responsibility provisions while excluding other "portions." Such an interpretation not only ignores or misconstrues key phrases of the guaranteed benefit policy definition but also is incapable of practical application. While the Second Circuit concluded that it could bifurcate Hancock's contract into guaranteed and non-guaranteed "portions," the court made no attempt

to identify any specific general account assets attributable or referable to the "non-guaranteed" portion of the contract. Nor could it have done so, inasmuch as there are no such assets, either as to Hancock's contract or as to any other general account contract, in whole or in part. State law requires that all general account assets be available to support all general account liabilities.[25] It would be legally impossible for an insurer to set aside a portion of its general account assets for a particular contractholder (or more particularly, for a specific "portion" of a contract) or to manage any particular assets for the exclusive benefit of a particular contractholder whose contractual rights are supported by such assets. *See supra* note 25. Even if assets could be segregated within a general account, policyholders would be deprived of all of the benefits of having their assets supported by a large pool of assets derived from diversified risks, a result contrary to their expectations in purchasing their contracts and to the terms of their contracts.[26]

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[25] *Supra* notes 3 & 6. State insurance liquidation statutes give all contractholders and other claimants "equal priority of payment from general assets," Uniform Insurers Liquidation Act § 6(1), 13 U.L.A. 347 (1986) (promulgated 1939); N.Y. Ins. Law § 7413(a) (1984) (originally enacted 1940); and authorize insurance departments to dispose of all of an insurer's assets. New York Ins. Law § 7429(a); *see also id.* § 7435 (order of priority for distribution of assets).

[26] Recently, state insurance regulators have authorized several insurers to allocate the investment results of specific general account assets to particular lines of business through a procedure referred to as "segmentation." McGill & Grubbs (1989), *supra* note 3, at 501-03. However, such assets are not held exclusively for the benefit of those lines of business. The general account continues to operate as a single pool of assets, with all assets continuing to stand behind all general account obligations. *Id.* at 502 ("Claims of a particular segment of contractholders are not limited to assets dedicated to that segment but are enforceable against the entire general asset account."). For this reason, segmentation does not constitute a segregation of assets in the sense of a trust or separate account or as to which the insurer could manage specific assets exclusively for the benefit of employee benefit plan participants and beneficiaries, as ERISA § 404(a)(1)(A) would require.

If any portion of general account assets were deemed to be plan assets, fundamental conflicts would result from imposing ERISA's fiduciary responsibility provisions on the existing scheme of state insurance regulation, or the result would be effectively to preempt state regulation of general accounts. *See* New York Brief, *supra* p. 2, at 5-12 (summarizing conflicts and interference with state regulation); *Mack Boring*, 930 F.2d at 275 n.17 ("Whenever an insurance company acts 'solely in the interest' of a pension plan customer, it would violate state law.").[27] The Second Circuit did not even acknowledge, let alone offer any guidance as to how to resolve these conflicting requirements of federal and state law. As the Third Circuit aptly summarized, however: "[W]e do believe that if Congress had intended so severe a disruption of insurance practices, practices that had been in existence for almost three decades before the enactment of ERISA, it would have made its intention perfectly clear." *Mack Boring*, 930 F.2d at 275 n.17; *see Harris Trust*, 722 F. Supp. at 1020. Inasmuch as the primary focus of state regulation is on the operation of the general account, *see* New York Brief, *supra* p. 2, at 6-9, Congress's intent not to subject general accounts to ERISA's fiduciary rules is evidenced in ERISA's "insur-

[27] The Third Circuit also recognized that ERISA was expressly "designed to prevent a fiduciary 'from being put in a position where he has dual loyalties, and therefore, he cannot act exclusively for the benefit of a plan's participants and beneficiaries.' " 930 F.2d at 275 n. 17 (quoting *Levy v. Lewis*, 635 F.2d 960, 968 (2d Cir. 1980)). Numerous other circuit court opinions have declined to impose fiduciary status when to do so would result in dual loyalties. *See, e.g., Useden v. Acker*, 947 F.2d 1563, 1576 (11th Cir. 1991), *petition for cert. filed* (June 1, 1992); *Levy v. Lewis*, 635 F.2d 960, 968 (2d Cir. 1980) (New York Superintendent of Insurance, in his capacity as rehabilitator of a financially troubled insurer, "is not the type of official whom Congress had in mind as an ERISA fiduciary. . . . Lewis's statutory obligation is to consider fairly the claims of all creditors of the bankrupt company; as a fiduciary, he could not help being put in a position of divided loyalty from the outset."); *United Indep. Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1262, 1268 (7th Cir. 1985) (union negotiator); *Brandt v. Grounds*, 687 F.2d 895, 898-99 (7th Cir. 1982) (depository bank).

ance saving clause," under which any state law which regulates the "business of insurance" is saved from the application of ERISA's broad preemption provision. 29 U.S.C. § 1144(b)(2); *see FMC Corp. v. Holliday*, 498 U.S. 52, 58(1990); *see also Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 736 (1985) ("Congress has indicated in the McCarran-Ferguson Act [15 U.S.C. § 1012(b)] that federal laws should not be construed to supersede state laws 'regulating the business of insurance.' ").

To construe section 401(b)(2)(B) as the Second Circuit did assumes that Congress intended to impose ERISA's fiduciary responsibility rules on the management of hundreds of billions of dollars of general account funds associated with thousands of contracts issued to ERISA plan contractholders.[28] While Congress clearly expressed its intention to subject separate account assets to ERISA's fiduciary responsibility provisions, *see supra* pp. 13-14 & note 20, neither the language of section 401(b)(2)(B) nor ERISA's massive legislative history evidences any similar intent with respect to general account assets. In view of the profound consequences to the insurance industry of the application of the fiduciary responsibility provisions to the management of general account assets, it is inconceivable that either the statute or its legislative history would be utterly silent if Congress had intended so significant a change. *See Mack Boring*, 930 F.2d at 275 n.17; *see also Massachusetts v. Morash*, 490 U.S. 107, 119 (1989) (regarding ERISA: "Absent any indication that Congress intended such far-reaching consequences, we are reluctant to so significantly interfere with 'the separate spheres of governmental authority preserved in our federalist system.' " (citation omitted)).

[28] The Council estimates that insurance companies held, by year-end 1991, over $314 billion of funds in their general accounts under unallocated contracts.

D. THE DEPARTMENT OF LABOR HAS CONSISTENTLY FOLLOWED THE APPROACH ADOPTED BY CONGRESS AND EXCLUDED GENERAL ACCOUNT ASSETS FROM PLAN ASSET TREATMENT

Because the statute lacked a comprehensive definition of plan assets, shortly following ERISA's enactment, the DOL issued its Interpretive Bulletin 75-2 ("IB 75-2"). 40 Fed. Reg. 31598 (July 28, 1975, issued Feb. 6, 1975) (currently codified at 29 C.F.R. § 2509.75-2). This bulletin describes certain types of assets, including general account assets, that do not constitute "plan assets":

> Generally, investment by a plan in securities . . . of a *corporation or partnership* will not . . . make such assets of the entity "plan assets" and thereby make a subsequent transaction between the party in interest and the corporation or partnership a prohibited transaction under section 406 of the Act.
>
> For example, if an insurance company issues a contract or policy of insurance to a plan and places the consideration for such contract or policy in its *general asset account*, the assets in such account shall not be considered to be plan assets. . . .

40 Fed. Reg. at 31598 (emphasis added).

As the agency charged with the administration of ERISA, the DOL's views on plan asset status are entitled to great deference. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984); *Massachusetts v. Morash*, 490 U.S. 107, 116 (1989); *Udall v. Tallman*, 380 U.S. 1, 16 (1965). Inasmuch as IB 75-2 was issued virtually contemporaneously with ERISA's enactment, and the DOL participated in drafting the statute,[29] deference is particularly appropriate here. *See Miller v. Youakim*, 440 U.S. 125, 144 (1979); *Udall v. Tallman*, 380 U.S. at 16.[30]

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[29] *See, e.g.*, Administration Recommendations to the House and Senate

The Second Circuit concluded that IB 75-2 defined "plan assets" only for purposes of ERISA's prohibited transaction provisions, 29 U.S.C. § 1106, but not for the statute's general fiduciary rules, 29 U.S.C. § 1103-1104, or other purposes. *Harris Trust*, 970 F.2d at 1145. This could not possibly have been the DOL's intent. ERISA nowhere contemplates that a party who exercises authority or control over the management or disposition of "plan assets" is to be an ERISA fiduciary for some purposes but not for others. Nor does ERISA authorize the DOL to define "plan assets" for one purpose but not for others.[31]

Conferees on H.R.2 to Provide for Pension Reform (April 1974), *reprinted in* III Legislative History of the Employee Retirement Income Security Act of 1974, at 5047 (Comm. Print 1976).

[30] The DOL not only recognized that IB 75-2 would receive judicial deference, it also encouraged reliance on its interpretation, as is evidenced in the following discussion between Congressman Erlenborn and DOL Assistant Secretary Paul J. Fasser in congressional hearings:

> Mr. Erlenborn. Now you mentioned one interpretive bulletin backed up by an IRS technical information release in the area of insurance funded plans. . . . [D]oes that have the force of law or is that only an advisory opinion?
>
> Mr. Fasser. In our judgment, its effect is the same as the technical information release that IRS has used successfully for many years. . . . and intend that they would have an *effect similar to that of a regulation*.

Oversight on the Employee Retirement Income Security Act of 1974: Hearings on Public Law 93-406 Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor, 94th Cong., 1st Sess. 400-01 (May 1 & 6, 1975) (emphasis added). Congressman Erlenborn further inquired, "[i]f someone relies on" IB 75-2, "have you possibly lulled some plan administrators and insurance companies into a false sense of security that may ultimately wind up with their being held in private suit for violating the act." *Id.* at 401. Assistant Secretary of Labor Fasser responded, "We think not," one reason being that under cases such as *Udall v. Tallman* "the courts will give great deference to the interpretation of the administrating agency as defined by the Congress." *Id.*

[31] ERISA contains an administrative procedure for the DOL to grant exemptions from the prohibited transaction provisions. 29 U.S.C. § 1108(a). Prohibited transaction exemptions do not, however, relate to either plan asset or fiduciary status. Rather, they state that particular

The DOL's intention that IB 75-2 would apply for all purposes is reflected in numerous pronouncements subsequent to IB 75-2. Significantly, three months after IB 75-2 was issued, Assistant Secretary of Labor Fasser explained in congressional hearings that, in issuing IB 75-2, the DOL "exercised [its] authority to interpret the law . . . stating that the mere investment of plan assets by a plan in a corporate entity does not convert the assets of the corporation or partnership into plan assets and does not make the managers of the corporation or partnership fiduciaries to the plan." ERISA Oversight Hearings, *supra* note 30, at 391. In the same vein, in a November 1975 release explaining ERISA's financial reporting requirements, the DOL stated:

> Under an ERISA IB, 75-2, . . . the assets held in the general account of an insurance company are *not* plan assets. However, assets removed from the general account would once again be considered plan assets. Because all assets in an insurance company are held in either the general account or pooled or individual separate accounts, *reporting requirements are applicable only to plan assets—those held in a separate account.*

Employee Benefit Plans—Proposed Annual Reporting Requirements, 40 Fed. Reg. 53710, 53710 (Nov. 19, 1975) (emphasis added; citation omitted).[32] At no time has the DOL ever stated that IB 75-2 was confined to prohibited transactions, either as to insurance company general accounts or as to the assets of corporations and partnerships (also covered by IB 75-2) whose securities are purchased by employee benefit plans.

In 1986, the DOL adopted a comprehensive regulation defining the term "plan assets." Final Regulations Relat-

transactions involving a fiduciary (or party in interest) and plan assets do not violate the proscriptions against conflicts of interest.

[32] *See also* DOL Advisory Op. 75-79 (Feb. 7, 1975); Proposed Regulations Relating to Definition of Plan Assets, 44 Fed. Reg. 50363, 50364 n.4 (Aug. 28, 1979); Proposed Class Exemption for Guaranteed Investment Contract Separate Accounts, 45 Fed. Reg. 51303, 51304 (Aug. 1, 1980).

ing to the Definition of Plan Assets, 51 Fed. Reg. 41262 (Nov. 13, 1986) (codified at 29 C.F.R. § 2510.3-101) (hereinafter Plan Assets Regulation).[33] The regulation provides definitions that apply for all purposes. *Id.* at 41264-65. Although the Plan Assets Regulation supplanted (on a prospective basis only) a portion of IB 75-2 dealing generally with plan investments in corporations or partnerships, *see id.* at 41278, the DOL specifically noted that "the portion of Interpretive Bulletin 75-2 dealing with contracts or policies of insurance is not affected by the [plan assets] regulation." *Id.* at 41278. Thus, because the DOL "chose to affirm the viability of IB 75-2(b) in the context of a plan assets regulation, [this Court] must assume that the regulation speaks authoritatively with respect to plan asset identification." *Mack Boring*, 930 F.2d at 276; *see Harris Trust*, 722 F. Supp. at 1019 (with Plan Asset Regulations, the DOL "confirmed the interpretation it set out in Interpretive Bulletin 75-2").[34]

Ignoring this substantial history of DOL pronouncements, the Second Circuit nonetheless concluded that its construction of section 401(b)(2) was supported by two DOL advisory opinions. The Second Circuit failed to realize, however, that these two opinions involved separate accounts and, thus, were completely inapposite to the types

[33] Congress directed the DOL to "adopt final regulations defining 'plan assets' by December 31, 1986." Pub. L. No. 99-272, § 11018(d), 1986 U.S.C.C.A.N. (100 Stat.) 277-80.

[34] Another ground for questioning the Second Circuit is that it apparently concluded that the "guaranteed benefit policy" provision was an "exclusive" safe-harbor, so that any insurance company assets not falling within the definition constitute plan assets. By its express terms, however, § 401(b) defines only two limited circumstances in which assets are *not* plan assets. In no way does it purport to impose plan asset status in all other circumstances. The non-exclusivity of § 401(b) is evidenced in Congress's unbridled mandate in 1985 for the DOL to define plan assets in a comprehensive regulation. *See supra* note 33. The Plan Assets Regulation provides that "plan assets" do *not* include, among other things, the assets of an "operating company," 29 C.F.R. § 2510.3-101(a)(2)(i) & (c), or the assets of an entity that issues securities that are not "equity securities." *Id.* at § 2510.3-101(a)(2) & (b)(1). The Second Circuit failed to apply these two provisions to general accounts.

of traditional general account contracts at issue here and in *Mack Boring*. DOL Advisory Op. 78-8A (Mar. 13, 1978) (account that CREF "label[ed] . . . a 'general' account" provided for variable annuity benefits and "constitute[d] a separate account as defined by the Act"); DOL Advisory Op. 83-51A (Mar. 13, 1983) (certain "guaranteed contract separate accounts" do not contain plan assets); *see Mack Boring*, 930 F.2d at 276-77 n.18 (noting these distinctions); *Harris Trust*, 722 F. Supp. at 1019 (same). The DOL did not state that either opinion was intended to modify IB 75-2. Moreover, the DOL made clear that these advisory opinions were intended to "apply only to the situations described therein." DOL ERISA Procedure 76-1, § 10, 41 Fed. Reg. 36,281 (Aug. 27, 1976) (quoted in *Mack Boring*, 930 F.2d at 276 n.18). Finally, any doubt that these opinions were not intended to modify the DOL's position in IB 75-2 is eliminated by the DOL's reaffirmation of that interpretive bulletin, subsequent to the issuance of the advisory opinions, in connection with the Plan Assets Regulation.

CONCLUSION

For all the foregoing reasons, this Court should reverse the judgment of the court of appeals that "free funds" constitute "plan assets."

Respectfully submitted,

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